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EXAMINER

ROWAN, KURT C

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Please find below and/or attached an Office communication concerning this application or proceeding.

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Art Unit: 3643



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/686,815
Filing Date: October 17, 2003
Appellant(s): DURAND ET AL.

Emily Bell
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed August 4, 2006 appealing from the Office action mailed May 4, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6443434

Prather

9/2002

(9) Grounds of Rejection

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-31 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wigton et al. (US 6,145,243) in view of Prather (US 6443434).

The patent to Wigton shows an insect capturing device as shown in Fig. 1, having a frame 12, 20, an insect trap chamber 34, 42, a supply of diffusible insect attractant 134 (Figure 3) and at least one air flow generator 38 that generates an outflow 50 and an inflow 52. Wigton shows an attractant 134 as disclosed in column 9, lines 11-16 and states that the attractant can be mounted in either housing 16 or 18. Both the trap enclosure 16 and the generator enclosure 18 would position the attractant 134 in the outflow or exhaust of fan 64. Wigton does not disclose the electrically powered heater operable to supply heat to the attractant above ambient temperature to facilitate diffusion of the insect attractant. The patent to Prather shows an electrically powered 28 heater 25 to increase the rate of diffusion of attractant 18. In reference to claims 1 and 26, it would have been obvious to provide Wigton with an electric heater as shown by Prather to increase the rate of diffusion of the attractant. In reference to claims 2 and 27, both Wigton and Prather disclose a liquid scent, but it would have been obvious to employ a

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solid or a semi-solid scent since the function is the same and no stated problem is solved. In reference to claim 3, Prather positions the heater element immediately adjacent the supply of attractant noting column 2, lines 36-58. In reference to claim 4, Wigton shows a perforated insect trap chamber 34. In reference to claim 5, Wigton shows an inlet path 52 and an outlet path 50 so that the inflow flowing through the perforated trap flows into the outflow path to become the outflow. In reference to claims 6-7, Wigton shows a fan system to generate an air flow having a suction fan 38 and an exhaust fan 64, but it would have been obvious to employ a single fan since the function is the same. Also, see *In re Kuhle*, 188 USPQ 7. In reference to claim 8, Prather shows a power cord with a connector (not labeled, but see Fig. 1). In reference to claims 9, 10, Prather discloses a battery 28 and the use of a solar cell 30. In reference to claim 11, Prather and Wigton show openings but do not disclose that they are adjustable. However, it would have been obvious to make the opening adjustable. See *In re Stevens*, 101 USPQ 284. In reference to claims 12-13, 15, 16, and 18, 19, neither Wigton or Prather show a heating element encircling the insect attractant, but it would have been obvious to encircle the attractant to maximize heat transfer to the attractant. Prather shows a heating element placed in a liquid attractant so it would have been obvious to located a heating element in the middle of the attractant such as in a internal bore. In reference to claims 14, 17, Prather discloses a resistance heater 25. In reference to claims 20-25, 30-31, Wigton shows outflow flowing downwardly and outwardly from the device and the inflow is substantially counter to and adjacent an upper portion of the outflow such that insect attracted to the outflow and along the upper portion thereof towards the outflow opening intersect the inflow and are thereby drawn into the trap by the inflow.

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3. Claims 32-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wigton.

The patent to Wigton shows a trap for flying insects as discussed above. In reference to claim 32, Wigton shows a frame 12, 16, 20, an insect trap chamber 34, 42 communicated to the surrounding atmosphere through at least one inlet opening 32 as shown in Fig. 3. Wigton shows a supply of a diffusible insect attractant in an attractant receptacle 134 as disclosed in column 9, lines 11-16. Wigton shows at least one airflow generator such as fan 64. Wigton does not disclose that the opening of the attractant receptacle has at least one adjustable opening. However, it would have been obvious to employ an adjustable opening to change the amount of attractant released to suit different operating conditions such as wind and temperature. See *In re Stevens*, 101 USPQ 284. In reference to claims 33-41, see the rejections of claims 1-31, above.

(10) Response to Argument

Applicant argues that the phrase “consisting essentially of” precludes the application of the Wigton reference which also includes carbon dioxide in the outflow in addition to an attractant and air sucked into the device. It should be pointed out that “ambient air” contains nitrogen, oxygen, carbon dioxide, and many other gases in small amounts such as ozone. The concentration of ozone, for example, can change from day to day and even hour to hour depending sunlight, temperature, and pollutants. In the same manner, carbon dioxide levels can vary from time to time and place to place. The ambient air at the outflow of the Wigton device would resemble ambient air from near a mammals mouth since there would be more carbon dioxide in the air at this point. However, this is still considered as ambient air and would not

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materially affect the basic and novel characteristics of the claimed invention. Also, the air in the outflow just outside of the outlet of the Wigton device is ambient air noting that the concentrations of several of the components in air can change with time and the air is still considered as ambient air. Applicant argues that the references do not teach a flow of the outflow through the receptacle. Wigton shows a trap for flying insects having an attractant 134 as shown in Fig. 3. See column 9, lines 11-16. The attractant is contained in a small open vial. Inherently, a small fraction of the air flow generated by the fan will flow into and out of the vial in addition to the evaporating compound diffusing into the atmosphere of either enclosure 16 or 18 and subsequent diffusion out of the apparatus. Since air flows into and out of the vial, the air can be considered to flow "through" the vial. Applicant argues the reference do not teach a solid or semi-solid diffusible insect attractant. However, Wigton states that the attractant is a volatile insect attractant and since solids and semi-solids (more correctly referred to as a gel) both have some degree of being volatile, that is, they have some vapor pressure, Wigton envisions or does not preclude the use of a solid or semi-solid insect attractant. As to the adjustable openings, to operate the insect trap, applicant does not require an adjustable opening, but it is recognized that an adjustable opening is desired for the purpose of maintaining the same level of attractant in the outflow by increasing the size of the opening as the amount of attractant decreases with time to yield a similar concentration in the outflow. As to the heater for the supply of solid or semi-solid attractant, Prather shows a heater to help diffuse the attractant, and the use of an encircling heater or a heater positioned within the bore of the insect attractant would only involve routine skill in the art since merely the shape of the heater would be changed and the function of the heater would be the same.

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In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the knowledge is generally available to one of ordinary skill in the art.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

KR

/Kurt Rowan/

Primary Examiner, Art Unit 3643

Conferees:

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